90-1049

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOHN H. BAKER, *et al.*,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, and JAMES B. BUSEY, Administrator,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ALAN M. SERWER
(Counsel of Record)
BELL, BOYD & LLOYD
Three First National Plaza
70 West Madison Street
Suite 3200
Chicago, Illinois 60602
(312) 372-1121

RAYMOND C. FAY
BELL, BOYD & LLOYD
1615 L Street, N.W.
Washington, D.C. 20036
(202) 466-6300

Counsel for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. Whether the FAA's thirty-year refusal to grant exemptions to its "Age 60 and Out" rule for airline pilots violates the Federal Aviation Act and agency regulations.

2. Whether the Court of Appeals' approval of the FAA's "no-exemption" policy for age sixty pilots, a policy inconsistent with the exemption standard for pilots under age sixty who are alcoholics and heart patients, is in conflict with decisions of other Courts of Appeals requiring agencies to apply consistent exemption standards.

3. Whether the FAA's refusal to weigh the safety and experience record of age sixty pilots against the serious public safety problems caused by pilot inexperience presents an issue of such importance under this nation's transportation policy that it should be settled by the Court.

LIST OF PARTIES

The parties in the Court of Appeals were John H. Baker, Courtney Y. Bennett, Robert S. Bos, John W. Chadick, Jack P. Chambers, Charles G. Criswell, Charles H. Deming, Burton E. Dezendorf, Herbert F. Ewald, Gerald G. Farrell, William A. Formato, Eugene W. Garges, Jr., Sylvester C. Iffert, James W. Keeling, Leon Lipsky, Walter M. Loflin, Robert A. Longwell, Don Lykins, Vincent J. Madden, Monroe G. Mathias, Henry L. Maxwell, Paul F. Moore, Richard P. Munger, Paul Pedersen, Philip J. Quimby, Herbert A. Riebeling, Duane E. Searle, Bernald S. Smith, John R. Steidl, and Edward B. Thompson as Petitioners; and James B. Busey, and Federal Aviation Administration, as Respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES.

REGULATIONS:

OTHER AUTHORITIES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOHN H. BAKER, *et al.*,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, and JAMES B. BUSEY, Administrator,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, John H. Baker, *et al.*, respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on October 31, 1990, affirming an order of the Federal Aviation Administration dated May 26, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, entered on October 31, 1990, is reported at 917 F.2d 318. It is reprinted in the Appendix hereto, p. 1a, *infra*.

The order of the Federal Aviation Administration dated May 26, 1989 is not reported. It is reprinted in the Appendix hereto, p. 21a, *infra*.

JURISDICTION

Petitioners filed petitions for exemption from the provisions of a rule of the Federal Aviation Administration (FAA) prohibiting airline pilots from service after age sixty ("age 60 rule"), 14 C.F.R. § 121.383(c), on June 3, 1986 and January 1988.

On May 26, 1989, the FAA entered an order denying the petitions. Pursuant to 49 U.S.C. App. § 1486(a), petitioners sought review of that order in the United States Court of Appeals for the Seventh Circuit. On October 31, 1990, the United States Court of Appeals for the Seventh Circuit affirmed the FAA's order (Will, J., dissenting). No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

Section 121.383(c) of the Federal Aviation Regulations provides (14 C.F.R. § 121.383(c)):

> No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

Section 601(c) of the Federal Aviation Act of 1958 provides (49 U.S.C. App. § 1421(c)):

> The Secretary of Transportation from time to time may grant exemptions from the requirements of any rule or regulation prescribed under this subchapter if he finds that such action would be in the public interest.

Section 11.25 of the Federal Aviation Regulations provides (14 C.F.R. § 11.25):

Petitions for rule making or exemptions.

(a) Any interested person may petition the Administrator to issue, amend, or repeal a rule whether or not it is a substantive rule within the meaning of § 11.21, or for a temporary or permanent exemption from any rule issued by the Federal Aviation Administration under statutory authority.

(b) Each petition filed under this section must—

* * *

(5) Contain any information, views, or arguments available to the petitioner to support the action sought, the reasons why the granting of the request would be in the public interest and, if appropriate, in the case of an exemption, the reason why the exemption would not adversely affect safety or the action to be taken by the petitioner to provide a level of safety equal to that provided by the rule from which the exemption is sought.

Section 1006(a) of the Federal Aviation Act of 1958 provides (49 U.S.C. App. § 1486):

(a) Orders subject to review; petition for review

Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the ex-

piration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

STATEMENT OF THE CASE

The Federal Aviation Administration (FAA) has a rule which prohibits pilots from serving in airline operations if they have reached their sixtieth birthdays. The "age 60 rule," 14 C.F.R. § 121.383(c), has been in effect since 1959, and no exception to the rule has ever been made.[1]

This case had its genesis in a June 3, 1986 petition for exemptions from the age 60 rule filed with the agency by a group of highly experienced airline pilots on major air carriers. The FAA's denial of the petition (order dated September 8, 1987) was the subject of a petition for review filed in the United States Court of Appeals for the Seventh Circuit. In 1988 the Seventh Circuit vacated the FAA's order and remanded with instructions to the agency for further proceedings. *Aman v. FAA*, 856 F.2d 946 (1988). The court noted in its decision that FAA's "progress in developing an understanding of the relationship between aging and flight performance has been disappointing." *Id.* at 949. The court determined that while medical science could not screen out, with certainty, "*all* of the incremental risk . . . among pilots older than sixty," the FAA had failed to conduct a "net risks" analysis and had

[1] The rule applies to pilots in air carrier operations, including cargo-only carriers like Federal Express. The FAA does not apply the rule to its own pilots or to NASA's pilots, who operate high performance and commercial-type aircraft. Nor does the rule apply to air taxi or commuter pilots, corporate pilots, or pilots flying in "general aviation."

"failed to set forth a sufficient factual or legal basis for its rejection of the petitioners' claim that older pilots' edge in experience offsets any undetected physical losses." *Id.* at 952, 954, 957 (emphasis in original). The court also concluded that, under the applicable "substantial evidence" standard, the FAA had failed to provide any "statutory justification[ ]" for its refusal to grant exemptions to healthy and experienced age sixty pilots, in light of its frequent grant of "special" exemptions to younger pilots "otherwise disqualified by episodes of heart disease or alcoholism." *Id.* at 957. The court stated that it was "essential" that FAA's explanation of its refusal to grant any exemptions to its age 60 rule reconcile the agency's "inconsistent determinations" in this regard in terms of its construction of its statutory responsibilities. *Id.*

On remand, after receipt of some 200 additional comments filed by industry experts, scientists, and physicians—all but a handful in strong opposition to the agency's inflexible position—the FAA again denied the petition.[2] In its order dated May 26, 1989, the FAA dismissed petitioners' showing that their experience far outweighed possible *undetected* age decrements, relying almost entirely on an unpublished 1983 report referred to below as the "Flight Time Study." (J.A. 530) The agency described the report as supporting its position that, for pilots over age sixty, the accident risk in general aviation (not airline operations) increases "dramatically . . . with age . . . ." (66a)

FAA explained that it had granted "special" exemptions under the "functional equivalent of a second exemption mechanism," *Aman* at 957, to over one thousand airline pilots who have been returned to air carrier duties despite

[2] The FAA had jurisdiction pursuant to 49 U.S.C. App. § 1421(c).

diagnoses of alcoholism, heart disease, myocardial infarction, bypass surgery, stroke, psychiatric disorders (including psychoses), neurologic defects, and diabetes. (68a) The agency asserted, however, that "their circumstances are not comparable with those of an individual who has reached" the "advanced age" of sixty, because for persons with "known disease, the prognosis for the disease can be assessed and specific tests or evaluations identified to monitor the condition." (*Id.*) In its order, the FAA also asserted that, for the numerous medical and psychiatric disorders for which "special" exemptions are granted, the conditions could be "clearly identified," and the agency had been "able to develop a means of assessment and surveillance specially designed to demonstrate the individual's capabilities and to identify any adverse changes." (*Id.*) The FAA concluded that such was not possible in the case of "aging," since there are "no generally applicable medical tests that can . . . adequately determine which individual pilots are subject to incapacitation . . . or to more subtle adverse conditions . . . ." (69a)

Petitioners sought review of the FAA's May 26, 1989 order in the Seventh Circuit Court of Appeals. In its decision dated October 31, 1990, the Court of Appeals affirmed the FAA's order (Will, J., dissenting), but rejected the heart of its rationale. The majority below found "serious flaws" in the Flight Time Study because the report had collected data so as to "significantly understate[ ]" the accident rates for pilots under age sixty and overstate the rate for pilots over that age. (5a) Rather than support the agency's position, the majority found that the Flight Time Study data instead could "be construed to support the petitioners' claims" that, among the most experienced general aviation pilots (Class III) not affected by the statistical flaws inherent in the other pilot classes,

pilots over age sixty had the *lowest* accident rates. (6a) Moreover, the court concluded that the FAA, while touting the Flight Time Study, was aware of the fact that "various experts, even some from the FAA, state that the study should not be relied on as determinative—or even probative—on the question of the continued validity of the age sixty rule." (5a, n.1)

With regard to FAA's policy of granting large numbers of "special" exemptions to disabled or impaired airline pilots under age sixty, based on modern medical assessment and monitoring techniques, the majority below expressed strong doubts as to the adequacy of the agency's articulated explanation ("Exactly how this distinction applies as a practical matter is not entirely clear to us. . . ."). (7a) Nonetheless, the court decided that it would "not require more of the FAA with respect to the consistency of restoring stricken younger pilots to duty while barring oldsters whose records are impeccable." (*Id.*)

The majority below acknowledged the "daunting" task petitioners faced, despite the "impressive expert opinion evidence" presented. (3a, 4a) It is, as the court acknowledged, "a Catch-22: from one perspective they cannot get exemptions until they show they can fly large passenger aircraft safely, and they cannot show they can fly such planes safely until they get exemptions." (7a-8a) The court concluded (9a):

> Certainly the record abounds with testimonials by experts in both flying and medicine to the experience and judgment of the older aviator and the feasibility of assuring the good health and performance of this kind of pilot through frequent and sophisticated testing. We are certainly not in a position to say that the numerous supporters of the petitioners' case are wrong. And it is obvious that the FAA must continue and must enhance its efforts to accommodate

> their points of view. At this time, however, we are not prepared to overrule the agency in a matter of such immense sensitivity as this one. The FAA should not take this as a signal that the age sixty rule is sacrosanct and untouchable. Obviously, there is a great body of opinion that the time has come to move on. The agency must give serious attention to this opinion.

In a vigorous dissent, Judge Will stated that, "rather than urging the FAA to recognize the need for keeping up with advanced technologies," he would vacate the FAA's order and remand: (1) for action to adopt regulations for the grant "of at least some exemptions"; (2) for a showing that pilots over age sixty are in fact significantly more prone to "sudden incapacitation"; and (3) for a reasoned and full explanation of the inconsistent exemption standards applied to "special" exemption applicants with manifest disease and age sixty applicants who are, based on medical testing, disease free. (17a, 18a) Judge Will observed, on this last point, that the FAA had "not offered any evidence to support this distinction between the special certificates it grants to younger pilots and its refusal even to promulgate meaningful regulations and criteria for age exemptions for older pilots, much less to grant an age exemption to an older pilot." (15a) He noted:

> Since the FAA has refused as a matter of policy to grant any exemptions, what the FAA and the majority are holding, in effect, is that *every* airline pilot, on his or her 60th birthday, and regardless of physical condition or experience, becomes a significantly greater safety hazard than before, even though, just one day before, he or she was FAA certified, qualified and safe. The evidence in this case does not warrant that conclusion. Nor does everyday, ordinary good old common sense.

(17a; emphasis in original)

REASONS FOR GRANTING THE WRIT

I. FAA's Thirty-Year Policy Of No Exemptions To Its "Age 60 Rule" Violates The Federal Aviation Act And The Agency's Regulations.

In enacting the Federal Aviation Act of 1958, 49 U.S.C. App. §§ 1301 *et seq.*, Congress plainly contemplated that the agency would grant exemptions to its rules and regulations in the "public interest." 49 U.S.C. App. § 1421(c). The congressional committee responsible for the bill which became law observed, in 1958, that the FAA's regulations must be "modified or repealed to meet changing conditions. Rulemaking processes should not lag far behind advances in equipment and techniques." H.R. REP. NO. 2360, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S. CODE CONG. & ADMIN. NEWS 3741, 3747.

The FAA's regulations provide for the grant of exemptions from "any rule" so long as the exemption does not "adversely affect safety" and provides a "level of safety equal to that provided by the rule from which the exemption is sought." 14 C.F.R. § 11.25. The agency's stubborn refusal to grant a single exemption in thirty years is at odds with the "expectation by Congress that *some* exemptions will be granted." *Starr v. FAA*, 589 F.2d 307, 311 (7th Cir. 1978) (emphasis in original). It also is inconsistent with the enormous advances since 1959 in medical technology, health status detection and monitoring techniques, pilot proficiency measurements and training using advanced cockpit simulators, improved health and health awareness in the public at large and in the highly regulated and monitored airline pilot population, and the well-established increases in life expectancy, fitness, and activity among the population over sixty years of age.

Although the record below documented dramatic changes in the state of the art in medicine and pilot performance evaluation techniques since 1959, the FAA has breached its commitment to explore and pursue a more flexible alternative to the age 60 rule. Instead, the record reflects the agency's intransigence and inaction in altogether failing to study or explore the feasibility of granting exemptions to individual airline pilots over sixty years of age.

It is necessary for this Court to resolve this issue because the hope held out by the Seventh Circuit's 1978 decision in *Starr* will otherwise be extinguished. The *Starr* court held that pilots could obtain relief from the rule in the future if they could show that FAA was "blindly adhering to an outdated rule" or engaging in a "[d]eliberate disregard of new advances in medical testing standards." 589 F.2d at 312, 314. Twelve years have passed since *Starr*, but despite the finding that the FAA's progress in exploring alternatives to a rigid no-exemption policy has been "disappointing" (*Aman* at 949), and the warning to the agency that the age 60 rule should not be considered "sacrosanct" (9a), the majority below refused to require the agency to do more. (7a)

The Court of Appeals effectively shut the door on future exemption requests and abdicated its judicial review function. This is nowhere more apparent than in its approval of FAA's articulated two-part exemption standard: *First*, airline pilots approaching age sixty must present "a *totally* reliable test or group of tests which would reveal *with certainty* any general deterioration of piloting skills associated with advancing age." (emphasis supplied) *Second*, the pilots must also "show they can fly large passenger aircraft safely . . . [by means of] a valid statistical demonstration of comparative safety records . . . in the same kinds of flying." (7a-8a)

Medical science will never fashion a "totally reliable test" that detects all conditions "with certainty." This requirement now approved by the Court of Appeals has never been the FAA-required standard for qualification as a pilot at any age. Under the Federal Aviation Act, while the FAA has the responsibility to consider the duty of air carriers to "perform their services in the highest possible degree of safety," that responsibility does not establish a requirement of "certainty" or absolute predictability as a regulatory standard. In *Nader v. FAA*, 440 F.2d 292, 293 (D.C. Cir. 1971), the court upheld the FAA's refusal to impose a no-smoking ban on airline flights, despite the fire and smoke risk. The court noted that the agency's regulatory obligations did not require it to "exclude all possibility of hazard." *Id.* at 294. Although the "hazard of combustion rises in some measure as the number of ignitors rises," the FAA's refusal to act was reasonable because the risk was "too small." *Id.* at 294, 295.

Similarly, pilots' ability to prove they can fly as safely after age sixty as the day before is, as the majority below recognized, "a Catch-22," because pilots "cannot get exemptions until they can show they can fly large passenger aircraft safely, and they cannot show they can fly such planes safely until they get exemptions." (7a-8a)

The FAA's creation of an exemption standard so onerous that it can never be met flows from its implicit contention that its authority to grant or deny exemptions under 49 U.S.C. App. § 1421(c) is part of an unreviewable delegation of power from Congress. This is contrary to law. In enacting the Federal Aviation Act, Congress stated its intention that the FAA's power should "be exercised in accordance with constitutional and statutory safeguards applicable to other agencies of the Government that have been granted similar rulemaking authority. . . ." H.R.

REP. NO. 2360, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. CODE CONG. & ADMIN. NEWS 3741, 3747. Contrary to FAA's rigid position on age sixty exemptions, the spirit of the Act is "flexibility," to enable the FAA to "respond to changing circumstances in aviation. . . ." *United States v. Eastern Air Lines, Inc.*, 792 F.2d 1560, 1562-63 (11th Cir. 1986).

An agency's discretion to enforce general rules is "intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). This "safety valve" provided by the grant of exemptions permits, through judicious flexibility, a "more rigorous adherence to an effective regulation." *Id.* at 1159.

The availability of appropriate relief by exemption from a rule has constitutional underpinnings. "If [a] . . . regulation stood alone with no provision for relief from its rather drastic commands, no matter what the circumstances, we would have grave doubt of its constitutionality vis-a-vis the Fifth Amendment's requirement of due process." *Community Serv., Inc. v. United States*, 418 F.2d 709, 711-12 (6th Cir. 1969). "[A]n effective waiver mechanism," therefore, "may be necessary to assure that the . . . rule affords due process. . . ." *Southwest Pennsylvania Cable TV, Inc. v. FCC*, 514 F.2d 1343, 1347 (D.C. Cir. 1975).

Not only is the FAA's interpretation of its congressional grant contrary to the Federal Aviation Act, but its construction of its mandate as permitting the maintenance of a "no-exemption" policy for thirty years is contrary to the teachings of this Court. In *American Trucking Associations, Inc. v. Atchison, Topeka, & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967), the Court approved an agency's

alteration of "past interpretation" and the "overturn of past administrative rulings and practice," stating:

> [T]his kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

The majority below warned the FAA that "there is a great body of opinion that the time has come to move on" and that the "agency must give serious attention to this opinion (9a)," even while it approved the agency's "no exemption" policy. In doing so, the Court of Appeals ignored this Court's warning that lower courts "must not 'rubber stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' " *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 97 (1983), (quoting *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965)). Since Congress's expectation was that at least some exemptions would be granted, the FAA's "Catch-22" exemption standard which forecloses exemptions is not "consistent with the congressional purpose," *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). To the extent the agency's regulations appear to provide that at least some exemptions may be granted, they are a "fraud." (Will, J., 18a)

II. The Court Should Resolve The Conflict Among The Courts Of Appeals As To Whether The Deference Owed To The Federal Aviation Administration Provides It With A License To Issue Inconsistent Determinations.

The decision in this case is in conflict with *Airmark Corp. v. FAA*, 758 F.2d 685 (D.C. Cir. 1985), and decisions in other circuits. In *Airmark*, the Court of Appeals for the District of Columbia Circuit held that the FAA's "complete failure to apply consistent criteria in granting or denying exemptions" required remand. *Id.* at 687. The court explained that while the agency had broad discretion in determining the public interest, it could not exercise that discretion arbitrarily. Any deference to which the agency was entitled was not a "license to . . . treat like cases differently," or to apply "different decisional criteria." *Id.* at 691, 692. On the contrary, the FAA had "no choice but to apply the same criteria to all. . . ." *Id.* at 691. Other courts have uniformly approved the *Airmark* standard.[3]

The *Aman* court cited with approval the *Airmark* standard, 856 F.2d at 957, ordering that, in light of the FAA's "increased willingness in recent years" to issue "special" exemptions to airline pilots "otherwise disqualified by

---

[3] *See also Capitol Technical Servs., Inc. v. FAA*, 791 F.2d 964, 967 (D.C. Cir. 1986). *Accord United States v. Diapulse Corp. of Am.*, 748 F.2d 56, 62 (2d Cir. 1984) ("agency may not grant to one person the right to do that which it denies to another similarly situated"); *Contractors Transp. Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) ("inconsistent application of agency standards"); *Frozen Food Express, Inc. v. United States*, 535 F.2d 877, 880 (5th Cir. 1976) (consistency from the government is required); *Independent Air, Inc. v. Department of Transp.*, 767 F.2d 1488, 1491 (11th Cir. 1985) (must apply exemption factors in a "consistent manner").

episodes of heart disease or alcoholism" (*see* 14 C.F.R. § 67.19), the agency provide a reasoned explanation as to its interpretation of the statutory exemption standard. *Aman* at 957. The FAA's response to the remand instructions was, as shown above, to: (1) misrepresent the findings of the "Flight Time Study," which the FAA was told was not "determinative—or even probative—" on the question of continued validity of the age 60 rule (5a, n.1); (2) ignore altogether the *Aman* court's request for the agency's interpretation of the statutory exemption standard; and (3) defend its grant of "special" exemptions to pilots with known pathology on the ground that it knows and can predict more about diseased airline pilots than it knows or can predict about apparently healthy aging pilots who have reached their sixtieth birthdays.[4]

Departing from *Aman*, *Airmark*, and decisions in the Second, Fourth, Fifth, and Eleventh Circuits, the majority below failed to insist on a credible explanation from the agency, apparently accepting the FAA's statement that it could better evaluate a pilot with known disease—even if chronic, progressive and likely to recur—than an age sixty pilot without disease. But as Judge Will noted in dissent, there is "no citation, either in FAA's brief or its latest order, for the proposition that the symptoms of alcoholism, drug abuse, and heart disease can be monitored more closely and reliably than the 'decrements' of aging." (15a) And while the majority below concluded that FAA's explanation for the distinction was "not entirely clear," it decided that it would "not require more of the FAA." (7a) This determination was squarely at odds with

[4] FAA failed to address the fact that significant numbers of pilots with "special" exemptions for medical defects have been subsequently grounded due to a relapse or recurrence of their condition.

an agency's obligation "to provide petitioner with an explanation for the difference in their treatment . . ." *Marco Sales Co. v. FTC*, 453 F.2d 1, 7 (2d Cir. 1971).

The FAA's rule forbids disease-free pilots over age sixty from continuing their service as airline pilots because they might develop diseases of the heart, brain, or organ systems. At the same time, the agency permits pilots with these same diseases to fly if they are under age sixty. FAA's wholly inadequate explanation for granting "special" exemptions to impaired pilots under age sixty while denying exemptions to unimpaired medically screened pilots over age sixty highlighted its inconsistent application of the exemption standard and its failure "to adhere to its own precedents." *Local 32, Am. Fed'n of Government Employees v. Federal Labor Relations Auth.*, 774 F.2d 498, 502 (D.C. Cir. 1985).

By permitting an exemption standard which allows disabled airline pilots under age sixty to fly while grounding all healthy pilots over age sixty, the Seventh Circuit's decision is squarely in conflict with the law in other circuits because it institutionalized an inconsistent exemption standard and uneven regulatory policy. The petition for a writ of certiorari should be granted to require the FAA to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

As Judge Will stated in dissent:

> The FAA, however, has not offered any evidence to support this distinction between the special certificates it grants to younger pilots and its refusal even to promulgate meaningful regulations and criteria for

> age exemptions for older pilots, much less to grant an age exemption to an older pilot. . . . We defer to agency expertise, where expertise has been demonstrated, but "deference should not be equated with a license to issue inconsistent determinations." *Aman*, 856 F.2d 957. The pilots have plausibly alleged that the FAA's distinctions and exemption practices are inconsistent. The FAA has only answered with unsupported and unconvincing assertions.

(15a)

III. The FAA's Refusal To Grant Age-60 Exemptions Or Adopt Standards Governing The Grant Of Exemptions Is Inconsistent With National Transportation Policy And Raises Important Questions Of Federal Law.

The age sixty rule is perhaps the last vestige of government-sponsored age discrimination directed toward private employment.[5] The "tortured" history of the rule is sum-

---

[5] The majority opinion recognized that age discrimination "may form a dimension of the issue . . . ." (3a) The FAA's no-exemption policy is in conflict with the purpose of the Age Discrimination in Employment Act (ADEA) "to promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age discrimination in employment." 29 U.S.C. § 621(b). In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 123 n.17 (1985), this Court noted that the airline pilot respondents sought to continue after age 60 as flight engineers, not pilots, and were not then challenging the age 60 rule itself. The Court left open the issue whether the FAA rule violated the ADEA, observing that the "EEOC guidelines . . . do not list the FAA's age-60 rule as an example of a BFOQ because the EEOC wishes to avoid any appearance that it endorses the rule. 29 C.F.R. § 1625 (1984)." That same term the Court unanimously held, in a case involving airline pilots requesting to serve as flight engineers after age sixty, that Congress when enacting the ADEA expressed a strong "preference for individual evaluation." *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422 (1985).

marized in *Aman*, 856 F.2d at 947-48. (*See* 2a) Since 1959 numerous pilots have petitioned unsuccessfully for individual exemptions from the FAA's rigid enforcement of the rule. Despite thirty years of "continuous controversy," *Aman* at 948, the FAA "has never granted an exemption—to anyone, regardless of his or her physical qualifications or experience." (Will, J., dissenting) (11a)

Petitioners supplied a virtual mountain of evidence in support of their position that the time has arrived for a more enlightened approach to the issue, including:

- extensive individualized medical/neuropsychiatric test results and reports for each petitioner, in accordance with a specially designed "Age Sixty Exemption Protocol." These exhaustive examinations were far more detailed than FAA's regular requirements for airline pilots and attested to petitioners' excellent health and neuropsychologic fitness (J.A. 6);
- a report by a distinguished panel of nationally recognized experts "with impressive qualifications in the fields of cardiology, aerospace medicine and neuropsychology," *Aman* at 949, concluding that the petitioners' "successful completion of their medical protocol was sufficient, in combination with operational tests imposed by the FAA and the airlines, to evaluate airline pilots over sixty years of age" (J.A. 1-4);
- 330 comments filed in the public docket from physicians, scientists, pilot organizations, flight instructors, FAA check pilots, and airline management pilots, strongly supporting the grant of exemptions from the rule. (FAA Pub. Dkts. 25008 and 25524) Only one physician, representing an industry group, supported the no-exemption policy. All 70 comments from airline check and instructor pilots opposed FAA's refusal to consider exemp-

> tions. Included among the scientific comments were the strong support from the Director of the National Institute on Aging, National Institutes of Health (J.A. 182, 228), and comments from the now-retired medical directors of United, TWA, and Northwest Airlines. As TWA's Dr. Charles Gullett concluded, "With today's tools and medical knowledge, it is readily possible to evaluate and select from those over 60 with acceptable risk levels. . . . I have never heard an argument that seasoned experience does not contribute to flight safety. Therefore, the exemption of these qualified and experienced pilots from the current 'Age 60 Rule' will enhance flight safety rather than just offset an increased health risk. . . ." (J.A. 481-83)

The *Aman* court directed the FAA to conduct a "net risks" analysis and provide a "sufficient . . . basis for its rejection of the petitioners' claim that older pilots' edge in experience offsets any undetected physical losses," and to explain its inconsistent exemption standards for healthy age sixty pilots and diseased pilots under age sixty. 856 F.2d 952, 957. As explained above, the FAA's response was based almost entirely on the Flight Time Study, which the agency knew was substantially flawed. (5a) The majority below, however, declined to require adherence to the *Aman* remand instructions because the matter was of "such immense sensitivity." (9a)

In refusing to require the FAA to comply with the governing statute and regulations, and in permitting the agency to essentially ignore the court's remand instructions, the majority below abdicated its judicial responsibility and created a new rule of law that an agency may defy the law and the courts whenever a matter is of "immense sensitivity." (9a) The public interest and our nation's transportation policy deserve more.

The record below contained extensive evidence of the safety implications of pilot inexperience, including: (1) a National Transportation Safety Board (NTSB) analysis stating that of the 13,739 aircraft accidents occurring from 1983 to 1988, a total of 926 were attributed to "pilot inexperience" as a cause or factor; (2) reports of several fatal airline accidents attributed to pilot inexperience, most notably a 1988 Continental Airlines crash in Denver in which pilot inexperience played an important role (J.A. 245-47), and a 1982 Air Florida collision with the 14th Street Bridge in Washington, D.C. (pilots ages 31 and 34) in which lack of experience in freezing weather conditions was an important factor. (J.A. 252, 259, 265)

The impact of diminishing levels of airline pilot experience has become even more acute in recent years. As the NTSB observed in September 1988:

> The rapid growth of the aviation industry at a time when fewer experienced pilots are in the workforce has reduced the opportunity for a pilot to accumulate experience before progressing to a position of greater responsibility. This loss of "seasoning" has led to the assignment of pilots who may not be operationally mature to positions previously occupiéd by highly experienced pilots.

(J.A. 246). The FAA has since urged airlines to "avoid assigning two relatively inexperienced pilots to the same flight" (J.A. 316, 319, 246; 39a), but has failed to increase the margin of safety by continuing the service of the safest, most experienced pilots.

While pilot inexperience has caused airline accidents, senior experienced pilots have averted them. Seventy airline check pilots, instructor pilots, and management pilots filed uncontroverted comments in the record, describing the tremendous value of experience, judgment, and matur-

ity possessed by pilots approaching age sixty. The majority below also recounted the "heroic deeds" of United Airlines Captain David Cronin, whose 38 years of experience saved a seriously damaged aircraft over the Pacific. (3a) As former FAA Administrator Donald D. Engen stated, "when push comes to shove, when everything turns to worms, experience is what really counts." (J.A. 276)

The FAA discounted the "heroic deeds" (3a) of Captain Cronin and those of Captain Al Haynes (Sioux City, Iowa in crippled DC-10) as only "isolated commendable acts." (47a, 50a) While not disputing that airline expansion and the age 60 rule have caused an almost unprecedented demand for new pilots, with attendant reduction in cockpit experience levels, the FAA stated that the retention of qualified pilots after age sixty would only temporarily defer the severity of the pilot shortage. (44a)

The issues of national importance posed by this case and its predecessors,[6] but which have never been considered by this Court, are: (1) whether the FAA's maintenance of a no-exemption policy for 30 years comports with its statutory mandate to regulate in the interest of safety and to grant exemptions "from time to time . . . in the public interest," and (2) how long the FAA may retain the rule without exemption in the absence of meaningful evaluation in light of modern medical knowledge. In these rapidly changing times of deregulation and airline expansion, when major airlines are hiring pilots with reduced

---

[6] *See Air Line Pilots Ass'n, Int'l. v. Quesada*, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961); *O'Donnell v. Shaffer*, 491 F.2d 59 (D.C. Cir. 1974); *Keating v. FAA*, 610 F.2d 611 (9th Cir. 1979); *Gray v. FAA*, 594 F.2d 793 (10th Cir. 1979); *Rombough v. FAA*, 594 F.2d 893 (2d Cir. 1979); and *Starr v. FAA*, 589 F.2d 307 (7th Cir. 1978).

levels of experience and then promoting them rapidly to captain positions, the forced retirement of airline pilots at age sixty reduces average cockpit experience levels by removing highly skilled and experienced age sixty pilots, many with thirty or more years of experience, and replacing them with relatively inexperienced new-hires.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the Seventh Circuit.

December 1990

Respectfully submitted,

ALAN M. SERWER
(Counsel of Record)
BELL, BOYD & LLOYD
Three First National Plaza
70 West Madison Street
Suite 3200
Chicago, Illinois 60602
(312) 372-1121

RAYMOND C. FAY
BELL, BOYD & LLOYD
1615 L Street, N.W.
Washington, D.C. 20036
(202) 466-6300

Counsel for Petitioners